APPENDIX "A"

Opinion of Supreme Court of Texas

IN THE SUPREME COURT OF TEXAS

No. A-11272.

HANK AVERY,

Petitioner,

From Midland County, Eighth District.

v.

MIDLAND COUNTY, TEXAS, et al.,

Respondents.

Article V, Section 18, of the Texas Constitution requires a division of the counties of Texas "from time to time, for the convenience of the people . . . into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one county commissioner . . ." This case presents for decision the question of the constitutional validity of such division in Midland County, Texas. The county was last redistricted by order of its commissioners court dated August 31, 1963, effective January 1, 1964. This suit by Petitioner, a resident property owner, taxpayer and qualified voter of Precinct No. 1, Midland County, attacks the division and seeks a redistricting. The judgment of the trial court set aside the current and previous orders dividing Midland County into commissioners precincts and ordered a redistricting of the county on the basis of equality of population in the precincts. The Court of Civil Appeals reversed the judgment of the trial court and rendered a take-nothing judgment against Petitioner. 397 S.W. 2d 919.

We reverse the judgments below and remand the case to the trial court for further proceedings.

The findings of the trial court in its judgment, and the decretal portions thereof, will be helpful to an understanding of our holding and disposition of the cause. We quote from the findings of the trial court:

> ". . . Further, that on the date [August 31, 1963] of such Order and at all other relevant times, Midland County, Texas, had a population of approximately seventy thousand (70,000) persons and that in excess of ninety-five per cent (95%) of such population resided in said new Commissioners' Precinct No. 1 and that the remaining population of said County was distributed among said new Commissioners' Precincts Nos. 2, 3, and 4. The court further finds that on the date of such Order and at all other relevant times in excess of ninety-seven per cent (97%) of the qualified voters of said County shown on the certified lists of qualified voters . . . resided in said new Commissioners' Precinct No. 1 and the remaining qualified voters of said County shown on said lists of qualified voters of said County shown on said lists of qualified voters were distributed among said new Commissioners' Precincts Nos. 2, 3, and 4. Further, that on the date of such Order and at all other relevant times other pertinent factors, such as land area and taxable values of said County, were grossly disproportionate among such new Commissioners' Precincts of said County. . . .
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> "The Court further finds that on the date of such Order and at all other relevant times the County of Midland could have been divided into Commissioners' Precincts on a basis or plan taking into proper account population, number of qualified voters, land area, taxable values, and other pertinent factors, which would have been and which would be practical and for the convenience of the people.

"The Court further finds that in passing and approving the Order of August 31, 1963, the Defendants . . . did not give due and proper consideration to the aforementioned factors or to any other factors which should have been considered in effecting any division of said County into Commissioners' Precincts. Further, that there was no evidence on the date of such Order or at any other relevant time justifying or supporting the division made by said Order. Further, that the principal purposes of Defendants . . . in passing and approving the Order of August 31, 1963, were for political expediency, to maintain the status quo, and to insure that the rural areas of Midland County, Texas, would continue to elect the majority of the members of the Commissioners' Court of said County.

"The Court further finds that in passing and approving the Order of August 31, 1963, the Defendants . . . acted arbitrarily, capriciously, unreasonably, unfairly, and wrongfully, and in gross abuse of their discretion, and that such action constituted invidious discrimination. Further, that the division of said County . . . was not for the convenience of the people of Midland County . . . ."

The decretal portions of the judgment, however, were as follows:

"IT IS, THEREFORE, ADJUDGED AND DECREED by the Court that the order of the Commissioners' Court of Midland County, Texas, passed and approved on the 31st day of August, 1963, dividing and redistricting said County into new Commissioners' Precincts, and all prior orders of the Commissioners' Court of said County dividing the same into Commissioners' Precincts, be and they are hereby, in all things, set aside.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that not later than the next succeeding July or August term of the Commis-

> sioners' Court of Midland County, Texas, that said Commissioners' Court . . . divide said County into four Commissioners' Precincts for the convenience of the people of said County and in so doing to establish such Commissioners' Precincts so that each will have substantially the same number of people."

Petitioner attacks the current and prior orders of the commissioners court dividing Midland County into commissioners precincts as invalid under Article V, Section 18, Article I, Section 3, and Article I, Section 19, of the Texas Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution, because of the gross population disparity. He argues that these constitutional provisions require equality of population in the precincts. Respondents assert, on the other hand, that Petitioner did not state or show a cause of action, or establish a justiciable interest or right to bring this suit as representative of a class, because equality of population in the precincts is not required but only that the precinct division be for the convenience of the people in the terms of Article V, Section 18, of the Texas Constitution.

Petitioner as a voter in the county has a justiciable interest in matters affecting the equality of his voting and political rights. Cf. *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. ed. 2d 663 (1962); *Stovall v. Shivers*, 129 Tex. 256, 103 S.W. 2d 363 (1937); *Dubose v. Woods*, 162 S.W. 3 (Tex. Civ. App. 1913, no writ hist.). We agree with the holding of the trial court that the current order of the commissioners court redistricting Midland County is not supportable under the requirements of the Texas and the United

States Constitutions for the reasons stated by the trial court in its judgment findings. We are not in agreement, however, with the judgment of the trial court to the extent that it orders a redistricting of the county on the sole basis of equality of population.

Article V, Section 18, of the Texas Constitution provides:

> "Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts . . . Divisions shall be made by the Commissioners Court provided for by this Constitution. . . . Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed."

Article I, Section 3, reads as follows:

> "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."

The county is a subordinate and derivative branch of state government. Its governmental body is the commissioners court composed of the four county commissioners with the county judge as the presiding officer. See Articles 2351 et seq., Vernon's Ann. Civ. Stats., for an enumeration

of the statutory powers and duties of the commissioners court. The appellation "court" is a misnomer in the accepted meaning of the designation. See 11 Tex. L. Rev. 518 (1933). The commissioners are elected by the qualified voters of the precincts; the county judge is elected by the qualified voters of the entire county. The primary function of the commissioners court is the administration of the business affairs of the county. See *Ehlinger v. Clark*, 117 Tex. 547, 8 S.W. 2d 666 (1928). Its legislative functions are negligible and county government is not otherwise comparable to the legislature of the state or to the Federal Congress, where the "one man one vote" principle is asserted in its most exacting and compelling sense. See *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. ed. 2d 506 (1964)[1]; *Westberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526, 11 L. ed. 2d 481 (1964); *Gray v. Sanders*, 372 U.S. 868, 83 S. Ct. 801, 9 L. ed. 2d 821 (1963). *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. ed. 2d 663 (1962).

This Court has not written upon the specific duty of the commissioners court under Article V, Section 18, to divide the county from time to time into four commissioners pre-

[1] "Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in Hunter v. City of Pittsburgh, 207 U.S. 161, 178, 52 L.ed. 151, 159, 28 S. Ct. 40, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,' and the 'number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State.' The relationship of the States to the Federal Government could hardly be less analogous." Reynolds v. Sims, supra, 377 U.S. at 575.

cincts for the convenience of the people. There are four cases in which the Courts of Civil Appeals have done so: *Lewis v. Harris*, 48 S.W. 2d 730 (Tex. Civ. App. 1932, writ ref.); *Ward v. Bond*, 10 S.W. 2d 590 (Tex. Civ. App. 1928, no writ hist.); *Williams v. Woods*, 162 S.W. 1031 (Tex. Civ. App. 1914, no writ hist.); *Dubose v. Woods*, 162 S.W. 3 (Tex. Civ. App. 1913, no writ hist.). In *Harris*, 20 per cent of the people of the county elected three of the four commissioners and the taxable values in the one precinct containing 80 per cent of the population substantially exceeded those of the three other precincts combined. The suit was for a mandamus to compel a redistricting. It was held that such facts did not show that the discretion of the commissioners court had been abused by arbitrary action, the court saying:

> "As applied to different situations, the phrase 'convenience of the people,' as used in the Constitution may have different meanings, but in our opinion it cannot properly be construed as imposing upon a commissioners' court the absolute duty of rearranging the boundaries of commissioners' precincts, from time to time, so as to accord to each precinct representation upon and power of control of the commissioners' court in proportion to their respective populations, voting strengths, and taxable valuations . . ."

Ward v. Bond considered a division order redistricting the county into new commissioners precincts equal in area but unequal in population to the extent that 54.5 per cent of the voters elected one commissioner, with 45.5 per cent electing the other three commissioners. The Court of Civil Appeals affirmed the action of the trial court sustaining the

division order. The Court stated that disparity in population was not a sufficiently serious consideration to justify a reversal of the trial court judgment but pointed out that the disparity in population would shortly disappear as the result of the construction of a railroad through the county. The Court also sought to distinguish the *Dubose* and *Williams* cases on the ground that the new division lines in these cases practically deprived some voters of their right of franchise.

The *Williams* and *Dubose* cases were sequels and county districting orders were held invalid in each case. In *Williams*, Dunn County was divided in such manner that 500 voters would elect two commissioners and 120 voters would elect two commissioners. There was a similar disparity in area. It was recognized by both parties that the precincts had been divided along ethnic lines, the Court saying:

> "The great disparity in acreage and population is sought to be justified only on the ground that the county should be so divided as to give the Anglo-Saxons a part of the precincts and the Mexican population the others. Convenience of the voter did not enter the consideration of the Court, but divisions of the territory were made that would tend to foment strife among citizens of different races."

Dubose involved a division of Dunn County under which 500 voters elected one commissioner and 140 voters elected the remaining three commissioners, together with similar disparity in area and public roads. Moreover, the precincts were drawn so as to deprive two towns in the county of polling places where they had been located for the past

thirty years. The Court said: "The facts alleged in the sworn petition show conclusively that as to neither class of precincts is the division of the county one which is convenient to the people of said county; and in fact such division is so arbitrary and wrong that the court should not for a moment tolerate the same . . . When considered as commissioners precincts, it is manifest that wrong was committed in making the districts largely disproportionate as to acreage and population . . . The government of the county will be taken away from the majority of the voters . . ."

The requirements of Article V, Section 18, of the Texas Constitution are to be construed and enforced consistently with Article I, Section 3, commonly referred to as the equal rights or equal protection clause of the Texas Constitution. Cf. *Railroad Commission v. Shell Oil Co.*, 139 Tex. 66, 161 S.W. 2d 1022 (1942). Equal protection of laws is not secured if persons are deprived of equality in political rights or otherwise subjected to an arbitrary exercise of governmental powers. See *Burroughs v. Lyles*, 142 Tex. 704, 181 S.W. 2d 570 (1944); *Mumme v. Marrs*, 120 Tex. 383, 40 S.W. 2d 31 (1931); *Glasgow v. Terrell*, 100 Tex. 581, 102 S.W. 98 (1907). This Court considered the terms "convenient" and "convenience of the people" appearing in Article V, Section 18, in *Williams v. Castleman*, 112 Tex. 193, 247 S.W. 263 (1922), involving an order of the commissioners court creating an additional justice of the peace precinct. Two principles relevant here were there recognized, namely, that in discharging the requirements

of Article V, Section 18, the commissioners court was given some discretion to meet the "changing needs of the people" but such must be "exercised in good faith and without fraud, not arbitrarily, nor in gross abuse of discretion."

The basic problem of Texas counties in the respects under review is the extent of political power which the metropolitan areas should have in relation to the rural areas. The very fact of population concentration enables the city voters to elect the county-wide officers. We recognized in *Pritchard & Abbott v. McKenna,* 162 Tex. 617, 350 S.W. 2d 333 (1961), that the county commissioners court is not charged with the management and control of all of the county's business affairs; and that the various officials elected by all the voters of the county have spheres that are delegated to them by law and within which the commissioners court may not interfere or usurp. The voice of the rural areas will be lost for all practical purposes if the commissioners precincts of counties are apportioned solely on a population basis except, perhaps, in those few sparsely settled counties without a concentration of urban centers. Yet, important affairs of the county administered by the commissioners court—such as roads, bridges, taxable values of large land areas—disproportionately concern the rural areas. Theoretically, the commissioners court is the governing body of the county and the commissioners represent all the residents, both urban and rural, of the county. But

developments during the years have greatly narrowed the scope of the functions of the commissioners court and limited its major responsibilities to the nonurban areas of the county. It has come to pass that the city government with its legislative, executive and judicial branches, is the major concern of the city dwellers and the administration of the affairs of the county is the major concern of the rural dwellers.

As we have said, equal rights and equal protection of laws require equality in political rights and there may be circumstances under which equality in population of political subdivisions electing representatives to an overall governing body is essential to equality in voting rights. On the other hand, the convenience of the people in the particular circumstances of a county may require—and constitutionally justify—a rational variance from equality in population in commissioners precincts upon the basis of additional relevant factors such as number of qualified voters, land areas, geography, miles of county roads and taxable values. The trial court in its judgment found that such considerations could have been taken into account in the precinct division in Midland County, notwithstanding which he ordered a redistricting to achieve substantial equality of population.

We agree with the holding of the trial court that there is obvious arbitrariness in the current districting order here

under attack because of the patent malapportionment of the commissioners precincts of Midland County. The judgment findings of the trial court show the absence of any rational basis therefor.

We disagree with the judgment of the trial court in its requirement that Midland County be redistricted into commissioners precincts solely upon the basis of population. For the reasons before stated, we are of the opinion that the equal protection of the law clauses of the Texas and the United States[2] Constitutions do not require a commissioners precinct division of Texas counties on this basis in all cases, dependent, of course, in each case upon the existence and effect of other relevant factors such as those we have mentioned. But neither this Court nor the district court has the power to redistrict Midland County into commissioners precincts. This is the responsibility of the commissioners court and is to be accomplished within the constitutional boundaries we have sought to delineate. In no event is a population disparity sustainable against a showing of discrimination, fraud, arbitrariness or abuse of discretion.

The judgments of the Court of Civil Appeals and of the trial court are reversed and the cause is remanded to

[2] "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." Amend. XIV, § 1, United States Constitution. See *Tedesco v. Board of Supervisors*, 43 So. 2d 514 (La. App.), appeal denied, 339 U.S. 940, 70 S. Ct. 797, 94 L. ed. 1357 (1960), and the clarification in *Baker v. Carr*, 369 U.S. at 235, of the dismissal of the appeal in *Tedesco* for want of a substantial Federal question, to wit, there was a rational justification for the population disparity in the districting of city council seats.

the trial court for the entry of judgment in accordance with this opinion at a time not to interfere with the 1966 general election process.

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Zollie Steakley
Associate Justice

Associate Justice Hamilton not sitting

Associate Justice Smith dissenting.

Opinion delivered

July 13, 1966.

APPENDIX "B"

DISSENTING OPINION

SMITH, Justice.

I respectfully dissent. I would affirm the judgment of the Court of Civil Appeals. This is not a "one man-one vote case," nor is there any constitutional requirements for equality in commissioners precincts. Article V, Section 18[1] of the Texas Constitution governs the organization of commissioners precincts. It is well settled by Texas cases that the phrase "for the convenience of the people" in said Article, confers on commissioners courts the discretion to divide precincts in some physically convenient way, and that there is no requirement for equality of population, and no duty to provide precincts which are equal in population. This is an "abuse of discretion case," the only question before this Court being whether a single private citizen, as here, has a vested right and cause of action to revise and review a commissioners court precinct order to achieve equali-

[1] "Sec. 18. Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. As amended Nov. 2, 1954."

ty in population. The trial court in its judgment, made several findings of fact, as the Court has indicated, but the decretal portion of the judgment only relates to the finding in regard to population disparity. The judgment directs the commissioners court to use equal distribution of population as the dominant factor in redistricting the County. The judgment rendered by this Court is meaningless. If the Court remands the cause generally for a new trial, citizen Avery has accomplished nothing. On the other hand, if the judgment of the trial court striking down the commissioners court order is upheld, still nothing has been accomplished, except to create additional chaos and confusion. This is true, because Avery, as a single individual and private citizen, has no right or standing in court to question the way the government is run or organized, including the location of commissioners precinct boundaries in Midland County, Texas, unless and until he can show some personal loss, damage or harm to his private interests resulting from the governmental operation. See Meredith v. Sharp, Tex. Civ. App., 256 S.W. 2d 870 (1953 writ refused, no reversible error) with Per Curiam opinion, 152 Tex. 437, 259 S.W. 2d 172. This case was one wherein mandamus was sought to require a commissioners court to create the office of Justice of the Peace, Place No. 2 of Justice of the Peace, Precinct One of Gregg County, Texas. I think the Court would have made the same holding had the cause been before the appellate courts on appeal.

The Court upheld the judgment of the trial court that Article V, Section 18 of the Texas Constitution "confides in the Commissioners' Court the authority to create a justice

of the peace court as here sought; that the convenience of the people is the basic purpose for designating such an additional justice court; and that the creation of such additional justice of the peace court is a discretionary act of the Commissioners' Court and not a ministerial function of such court." The Court then said:

> "We cannot escape the import of the use of the term 'for the convenience of the people' in Sec. 18, supra; 16 C.J.S., Constitutional Law, § 23. The latitude so granted the Commissioners' Court to create not less than four and not more than eight such precincts, and the power to change the boundaries of such precincts from time to time emphasizes the intent to vest discretionary powers in the Commissioners' Court in determining whether or not the creation of such additional court would be for the convenience of the people, that is suitable, appropriate or advisable to meet the needs of the people. This discretionary power on the part of the Commissioners' Court is fully recognized in Williams v. Castleman, 112 Tex. 193, 247 S.W. 263, by our Supreme Court, which involved an affirmative act of the Commissioners' Court in creating such an additional Justice Court, and in the holdings in Lewis v. Harris, Tex. Civ. App., 48 S.W. 2d 730, and Ward v. Bond, Tex. Civ. App., 10 S.W. 2d 590, 594, which dealt with the discretionary powers of a Commissioners' Court as related to the latter clause of Sec. 18, supra, in altering a Commissioners' Precinct.
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> "'Mandamus will not lie to control or review the action of an official or board upon matters involving the exercise of discretion or judgment confided to such official or board.' Lewis v. Harris, supra, 48 S.W. 2d at page 732; 28 T.J. (Mandamus), Sec. 33."

This holding in regard to discretionary power to create justice courts is equally applicable to this case where the commissioners court has exercised its discretion in changing its boundary lines.

If it can be said that the judgment of the trial court is based upon a finding of abuse of discretion and that Avery has a justiciable interest, I nevertheless maintain that the trial court confined its holding to require a redistricting of Midland County into commissioners precincts upon the basis of population alone.

Avery is in no position to individually attack or set aside the order creating Midland County commissioners precincts because of a disparity in the population of the several precincts in the absence of a showing of some damage, harm, inconvenience, or financial loss to himself personally. This he has failed to do. There being no duty to provide Avery with equally populated commissioners precincts, no legal wrong has been done to him by refusal to divide in that way; there has been no invasion of his personal rights by including him in a commissioners precinct with a population larger than the other precincts.

Avery attempts to also bring this suit in terms of a class action. In this attempt he completely fails. In his petition he states his capacity as follows:

> "Plaintiff files this petition on behalf of himself and other persons similarly situated in the City of Midland, Precinct No. 1, Midland County, Texas, and states that he is a resident, taxpayer, and legally qualified voter and elector of the City of Midland, Precinct No. 1, Midland County, Texas, and that, as such, he is legally qualified to vote for municipal, precinct and county offices in Midland County, Texas."

The right which he sought was as follows:

> "The Plaintiff has a right and interest to see that *his* civil rights and liberties and in particular *his* right and

interest in an equitable apportionment of voting power for members of the Commissioners Court are protected in accordance with the terms of the Texas Constitution and Section 1 of the 14th Amendment to the Constitution of the United States."

The pleadings in this case upon which Avery went to trial are completely void of allegations which would qualify as a class action. The petition fails to comply with any of the provisions of Rule 42,[2] Texas Rules of Civil Procedure. Only a quick glance at the rule is required to conclude that Avery does not seek to qualify under subdivision (1) of the rule, because the rights which he seeks to enforce are *his* rights and liberties and *his* right to equitable voting power. Such right is not joint or secondary and on its face could not be the proper subject of a class action under subdivision (1) of the rule. Subdivision 2 is out, because there is no specific property involved in this action. Avery's petition fails to

[2] "(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, in behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

"(1) joint, or common or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

"(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

"(b) Dismissal or compromise. A class action shall not be dismissed nor compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it. Amended by order of September 20, 1941, effective December 31, 1941."

qualify him as representing a class, in that it fails to state that there are persons constituting a class. The petition on which he went to trial does not allege that there are other persons having a common interest with Avery in adjudication of a common question of fact or law. In fact, the record shows that public officials and many others who publicly refused to support Avery, were all citizens of Midland. The evidence and the proceedings fail to show any support of Avery's position from the City of Midland or the residents of the City as a group. The petition does not describe any identifiable class of persons nor state or show that they are so numerous as to make their joinder in the suit impracticable. There is nothing in the petition to show that there are others "similarly situated." The pleadings are lacking and Avery produced no evidence to warrant a valid class judgment. See Schenker v. City of San Antonio, Tex. Civ. App., 369 S.W. 2d 626 (wr. ref., n.r.e. 1963).

Since the subject matter of Avery's complaints in this Court is the disparity of population, and since that subject is a matter of *public* not *private* concern, and since Avery did not properly allege or prove a class action in the trial court, so as to represent the public, the result is that he never reaches or gets to the question of substantial evidence, abuse of discretion, or his asserted claims to *alternative*[3] relief.

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[3] The prayer, reflecting the relief sought, reads as follows:

"Wherefore, premises considered, Plaintiff prays that Defendants be cited to appear herein and that upon final hearing Plaintiff have judgment as follows:

"(a) That the Defendants Gideon, Bryant, Moreland, and Osborne, constituting a majority of the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of

Avery has no standing in this Court to complain of the action of the Court of Civil Appeals on his substantial evidence and alternative relief claims. I would dismiss this cause for want of jurisdiction. In no event does the Constitution of the United States or the Texas Constitution require that Midland County be divided into four equally populated precincts. The Court's view, if finally adopted, will lead to great confusion and uncertainty not only in Midland County, but in every county in Texas with citizens who have a desire to substitute their judgment for that of

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their discretion in passing and approving the Order of August 31, 1963, dividing Midland County into Commissioners' Precincts and that said Order, and all prior Orders dividing said county into Commissioners' Precincts, be set aside and that said Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, be directed to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people.

"(b) In the alternative, that the Defendants Gideon, Bryant, Moreland, and Osborne, constituting a majority of the members of said Commissioners' Court, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of their discretion in passing and approving the Order of August 31, 1963, dividing Midland County into Commissioners' Precincts and that said Order, and all prior Orders dividing said County into Commissioners' Precincts, be set aside and that said Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, be directed to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people, giving proper consideration to equality of population, qualified voters, land area, tax values, miles of County roads, and other pertinent things among said Commissioners' Precincts.

"(c) In the alternative, that the Defendants Gideon, Bryant, Moreland and Osborne, constituting a majority of the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly, and wrongfully and in gross abuse of their discretion in passing said Order and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that writ of mandamus issue compelling the Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing to establish, as nearly as possible and practicable, such Precincts so that each will have substantially

the commissioners courts. It seems to me that this is not the proper case in which to extend the doctrine of the one man-one vote rule to the governing bodies of local governments such as commissioners courts. Perhaps, in a proper case, the federal courts will in the future take jurisdiction under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, but I cannot imagine a situation, much less the one presented in this case, where the Texas Constitution of the case law would warrant a holding that there must be equality of population in Commissioners precincts.

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the same number of people, qualified voters, square miles, and other pertinent things.

"(d) In the alternative, that the Defendants Gideon, Bryant, Moreland, and Osborne, constituting the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of their discretion in passing said Order and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that writ of mandatory injunction issue restraining and enjoining the Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court from continuing said Order in effect or calling or conducting any election thereunder and directing said Defendants to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing so establish, as nearly as possible and practicable, such Precincts so that each will have substantially the same number of people, qualified voters, square miles, and other pertinent things.

"(e) In the alternative, that the Order of said Defendants on August 31, 1963, dividing Midland County into Commissioners' Precincts was and is repugnant to and in conflict with one or more of the following: The Fourteenth Amendment, Section 1, of the Constitution of the United States of America and Article 1, Sections 1, 2, 3, and 19, of the Constitution of the State of Texas, for the reason that it deprives Plaintiff and others similarly situated of their constitutional rights, privileges, liberties, and guarantees, and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that said Defendants, as members of the Commissioners' Court be directed to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing to establish, as nearly as practicable and possible, such Precincts so that each will have substantially the same number of people and qualified voters."

APPENDIX "C"
OPINION OF THE COURT OF CIVIL APPEALS

CLAYTON, Justice.

This is a county commissioners' precinct redistricting case, appealed from the judgment of the District Court of Midland County, Texas. Avery, appellee here, brought the suit as a resident property owner, tax payer and qualified voter of the City of Midland, County Commissioners' Precinct No. 1, Midland County, Texas, "individually and on behalf of other persons similarly situated and qualified" against the County of Midland and its county judge and four county commissioners, appellants here. Plaintiff-appellee's pleadings reflect that, since the time of its incorporation in 1901, the City of Midland, lying virtually in its entirety in Commissioners' Precinct No. 1, has been the only incorporated city, town or village in Midland County. The city's population has grown through the years until at the time of the 1960 Federal Decennial Census its population represented 92.48 per cent of the population of the county, and Precinct No. 1 contained 97.80 per cent of the population of the county. Of the qualified voters of the county in that year, 97.88 per cent resided in Precinct No. 1. Plaintiff asserted that other things, such as market value and assessed value of taxable property, miles of county roads, land area, allocation and use of county funds and revenue, etc., were disproportionately distributed among the commissioners' precincts of the county, making the precincts as established "grossly impractical and inconvenient to the people". In September, 1962, plaintiff petitioned the Com-

missioners' Court for a redistricting of the county's precincts, but "such petition and request was refused". In that same month this suit was filed to compel a redistricting, invoking the jurisdiction of the district court under its supervisory control of county commissioners' courts as provided in Article V, § 8 of the Texas Constitution, Vernon's Ann. St. During the pendency of this suit, and in July and August, 1963, public hearings were held by the Commissioners' Court on the matter of redistricting the county, during which time plaintiff and others testified or presented plans for such redistricting. On August 31, 1963, plaintiff's pleadings relate, the Commissioners' Court adopted an order, effective January 1, 1964, redistricting Midland County into commissioners' precincts, which order, plaintiff alleges, made only insignificant changes in the boundaries of commissioners' precincts and in no way corrected or lessened the great disparity in population, qualified voters, land area, assessed value of taxable property, miles of county roads and other pertinent things among the commissioners' precincts of said county; that in passing said order the commissioners had acted arbitrarily and capriciously, in abuse of their discretion and without regard to the convenience of the people of Midland County or the rights, privileges and guarantees of plaintiff and others similarly situated by the Constitution of the State of Texas and of the United States. Plaintiff prayed that such order of the Commissioners' Court of August 31, 1963 and all prior orders dividing Midland County into commissioners' precincts be set aside and that writ of mandamus issue compelling the defendants to pass a new order giving

proper consideration to equality of population and the other factors said by plaintiff to be pertinent in the division of the county into commissioners' precincts.

The presiding judge, who heard the cause without the intervention of a jury, found that Precinct No. 1 had in excess of 95 per cent of the total population of the county under the order of August 31, 1963, and that on the date of such order over 97 per cent of the qualified voters of the county resided in said Precinct No. 1, and that there was a gross disparity of other pertinent factors, such as land area and taxable values in said order as in all previous orders dividing said county into commissioners' precincts; that in passing such order of August 31st the defendants had acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully, in gross abuse of their discretion, and that their action constituted invidious discrimination. The court's judgment further found that the said order was not for the convenience of the people of said county as required by Article V, § 18 of the Constitution of the State of Texas. The judgment of the court set aside said order and all previous orders dividing the county into commissioners' precincts, and ordered that the Commissioners' Court, not later than the next succeeding July or August term of said court, "divide said County into four Commissioners' Precincts for the convenience of the people of said County and in so doing to establish such Commissioners' Precincts so that each will have substantially the same number of people."

[1] Appellant Commissioners advanced twelve points of error and appellant Midland County presented two points

of error attacking the District Court's order as above set out. We deem it unnecessary to discuss these points separately or at length, but will treat only those assignments which relate to that part of the order underscored above which embodies the mandatory requirement that the county be divided into precincts so that each would have substantially the same number of people. We are in accord with the assertion by appellant Commissioners that "neither the Constitution of the United States nor the Constitution of Texas, as construed and interpreted by the courts, contains any requirement that county commissioners precincts be equal to each other in population * * *" Article IV, § 4 of the United States Constitution merely provides that "The United States shall guarantee to every State in this Union a Republican Form of Government * * *." Amendment XIV, section 1 provides: "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article V, § 8 of the Texas Constitution provides that the district courts "shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law; * * *"; and § 18 of the same Article relates to commissioners' precincts:

> "Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than

> four and not more than eight. * * * Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner * * *. The County Commissioners, so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. * * *"

Among the scant authority in Texas on the subject of establishment of commissioners' precincts is to be found in the 1932 opinion of this court in Lewis v. Harris, 48 S.W. 2d 730, in which a writ of error was refused. This was a redistricting case which arose in Upton County, and we find the facts involved and the language employed so nearly applicable to the case before us as to justify quotation therefrom at some length. The court states:

> "* * * Appellants cite section 18, art. 5, of the State Constitution which, in substance, requires the division of the county 'from time to time, for the convenience of the people, into precincts,' and that the commissioners' precincts shall be four in number.
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> "Disregarding legal conclusions stated therein, the petition here simply shows a state of facts which gives to the town of Rankin and precincts Nos. 1, 2, and 3 a power of control over the commissioners' court of the county out of proportion to their population, voting strength, and taxable values, thereby denying to the town of McCamey and precinct No. 4 the representation upon the court and power of control to which such town and precinct is justly entitled by the population, voting strength, and taxable values thereof.
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> "As applied to different situations, the phrase 'convenience of the people,' as used in the Constitution,

may have different meanings, but in our opinion it cannot properly be construed as imposing upon a commissioners' court the absolute duty of rearranging the boundaries of commissioners' precincts, from time to time, so as to accord to each precinct representation upon and power of control of the commissioners' court in proportion to their respective populations, voting strengths, and taxable valuations. This is what the present action seeks to compel. The location of cities and towns in certain counties is no doubt such that it cannot be conveniently done. From a political viewpoint it is desirable and just that the precincts should be so arranged, but in some instances it is doubtless not practical.

"It is not alleged that a redivision of the county as sought is practical and convenient for the people. Plaintiffs simply base their demand upon population, voting strength, and taxable valuation. The present division is inconvenient in the sense only that the town of McCamey and precinct No. 4 have not the representation upon and control of the commissioners' court to which the plaintiffs say such town and precinct are justly entitled by the population, voting strength, and taxable valuation thereof.

"There is no law imposing upon a commissioners' Court the duty of rearranging the commissioners' precincts of a county upon such a basis, and the writ of mandamus will not lie to compel such action. The demurrers were properly sustained."

The cited case is given recognition in Hatter v. Worst, 390 S.W. 2d 293 (Tex. Civ. App., 1965; n.r.e.), although Lewis v. Harris was not controlling on the issue involved in the latter case. An analytical and well-documented discussion of the case now before us is to be found in the Winter, 1965 issue of the Baylor Law Review, Vol. XVII, No. 1, p. 41, written by J. William Davis, which it would be well

for the reader of this opinion to review for additional background information on the case before us.

[2, 3] We have come to the conclusion that the judgment of the lower court in the instant case must be reversed. It has been stated here that this judgment orders the Commissioners' Court of Midland County to divide said county into four Commissioners' Precincts "for the convenience of the people of said County" and in so doing to establish such commissioners' precincts "so that each will have substantially the same number of people". The order thus exceeds the admonition contained in the Texas Constitution that requires only that the division of the county in such precincts be "for the convenience of the people", which, as stated in Lewis v. Harris, supra, cannot properly be construed as imposing upon a commissioners' court the absolute duty of rearranging the boundaries of commissioners' precincts so as to accord to each precinct representation upon and power of control of the commissioners' court in proportion to their respective populations, voting strengths and taxable valuations, however desirable, in certain instances, such a division might be. Just as there is no law or constitutional requirement that such a division be made, neither is there authority, in our opinion, for the lower court herein to compel the establishment of commissioners' precincts so that each will have substantially the same number of people. Following this reasoning, the lower court was without authority to enter the order embodied in its judgment, and such judgment must therefore be reversed.

Since this case has been thoroughly tried and expertly briefed by both parties, we feel that no useful purpose would be served by a remand, and this cause is therefore here rendered for the appellants.

Reversed and rendered.

APPENDIX "D"

CONSTITUTION OF STATE OF TEXAS

Art. 5 Sec. 8. Jurisdiction of District Court

Sec. 8. The District Court shall have original jurisdiction in all criminal cases of the grade of felony; in all suits in behalf of the State to recover penalties, forfeitures and escheats; of all cases of divorce; of all misdemeanors involving official misconduct; of all suits to recover damages for slander of defamation of character; of all suits for trial of title to land and for the enforcement of liens thereon; of all suits for the trial of the right of property levied upon by virtue of any writ of execution, sequestration or attachment when the property levied on shall be equal to or exceed in value five hundred dollars; of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest; of contested elections, and said court and the judges thereof, shall have power to issue writs of habeas corpus, mandamus, injunction and certiorari, and all writs necessary to enforce their jurisdiction.

The District Court shall have appellate jurisdiction and general control in probate matters, over the County Court established in each county, for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators and guardians, and for the transaction of all business appertaining to estates; and original jurisdiction and general

control over executors, administrators, guardians and minors under such regulations as may be prescribed by law. The District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this Constitution, and such other jurisdiction, original and appellate, as may be provided by law. As amended Aug. 11, 1891; proclamation Sept. 22, 1891.

Art. 5, Sec. 18. Division of counties into precincts; election of constable and justice of the peace; county commissioners and county commissioners court

Sec. 18. Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold

his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. As amended Nov. 2, 1954.

APPENDIX "E"

ACTS OF THE TEXAS LEGISLATURE

Art. 1908. Over commissioners courts

Such court shall also have appellate jurisdiction and general supervisory control over the commissioners court, with such exceptions and under such regulations as may be prescribed by law. Id.

Art. 2.04. County election precincts formed by commissioners court

(a) Each county shall be divided into convenient election precincts by the Commissioners Court of the county, each of which precincts shall be differently numbered and described by natural or artificial boundaries or survey lines by an order entered upon the minutes of the Court. At any July or August term, the Court may make such changes in the election precincts as they deem proper, by such order entered upon the minutes of the Court. When such an order is entered, they shall immediately thereafter publish in some newspaper in the county for three consecutive weeks a notice of the entry of such order, giving a brief description in general terms of the changes made, giving a brief description in general terms of the changes made, without the necessity of including in such notice the field notes or other detailed description of the precinct boundaries. If there be no newspaper in the county, then a copy of such order shall be posted in some public place in each election precinct in the county which is affected by the order.

(b) No election precinct shall be formed out of two or more justice precincts or commissioners precincts, nor out of the parts of two or more justice precincts or commissioners precincts; and no election precinct shall be formed out of two or more Congressional Districts or State Senatorial Districts or State Representative Districts, nor out of the parts of two or more such Districts. If in September of any year there exists any election precinct in the county which does not comply with the foregoing requirements, the Commissioners Court shall make the necessary changes before the first day of October, either at a regular meeting or at a special meeting called for that purpose; and the order shall be published as provided in Paragraph (a) of this Section. No election precinct shall have resident therein more than two thousand voters as ascertained by the current certified lists of qualified voters; provided, however, that in precincts in which voting machines have been adopted for use, the maximum number of voters shall be three thousand.

(c) In cities and towns having ten thousand or more inhabitants, each ward shall constitute an election precinct unless there shall reside in said ward more than two thousand qualified voters. In such cities and towns, no precinct shall be made out of parts of two wards; and no precinct shall include territory outside the corporate limits of the city or town unless the Commissioners Court finds that adjacent unincorporated territory is so situated that it cannot be formed into or included within an election precinct wholly outside the city, of suitable size and shape and

containing a suitable number of voters. If the Commissioners Court finds this condition to exist, it may include such territory in a precint or precincts formed within the city or town, and the finding of the Commissioners Court shall be conclusive.

(d) In cities, towns and villages of less than ten thousand inhabitants, election precincts may be formed without regard to the wards or the corporate limits of the city, town or village.

(e) Changes in election precincts shall not become operative in the holding of elections until the beginning of the following voting year. The Commissioners Court shall cause to be made out and delivered to the County Tax Collector before the first day of each September, a certified copy of such last order for the year following; provided, however, that any order entered during the month of September, as provided in Paragraph (b) of this Section, shall be delivered to the Tax Collector forthwith. Acts 1963, 58th Leg., p. 1017, ch. 424, Sec. 7; Acts 1965, 59th Leg., p. 1552, ch. 678, Sec. 1, emerg. eff. June 18, 1965.